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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN JOSE DIVISION**13 ANGEL FRALEY; PAUL WANG; SUSAN
14 MAINZER; JAMES H. DUVAL, a minor, by
15 and through JAMES DUVAL, as Guardian ad
Litem; and W.T., a minor, by and through
16 RUSSELL TAIT, as Guardian ad Litem;
17 individually and on behalf of all others similarly
situuated,18 v.
19 Plaintiffs,
20 FACEBOOK, INC.,
21 Defendant.

Case No. CV 11-01726 LHK (PSG)

**DECLARATION OF AARON M. ZIGLER
IN FURTHER SUPPORT OF MOTION TO
INTERVENE**

Date: July 12, 2012
 Time: 1:30 p.m.
 Courtroom: 8
 Judge: Hon. Lucy H. Koh
 Trial Date: December 3, 2012

22
23 **DECLARATION OF AARON M. ZIGLER**

24 I, Aaron M. Zigler, being first duly sworn upon my oath, depose and state as follows:

25 1. I certify that the statements set forth in this instrument are true and correct. I make
26 the following statements based on my personal knowledge and if called, I could competently
27 testify to the matters stated herein.

1 2. I am an attorney for the plaintiffs and putative class members in the *C.M.D. v.*
 2 *Facebook, Inc.* matter, No. 12-cv-01216-LHK (“*C.M.D.*”). I am submitting this affidavit in
 3 support of Movants’ motion to intervene in the *Fraleys, et al. v. Facebook, Inc.* matter, No. 11-
 4 01726 (“*Fraleys*”).

5 3. I am a partner at Korein Tillery where I represent consumers in complex class
 6 action litigation and appeals. I have been recognized for my skill in the practice receiving a
 7 Martindale-Hubbell AV® Preeminent™ peer rating and being selected as a 2011 & 2012 Super
 8 Lawyers® “Rising Star.”

9 4. Prior to my legal career, I worked in computer security for a Fortune 500 company
 10 headquartered in St. Louis. While in law school, I continued my interest in computer technology
 11 by concentrating my studies in that area. I began my legal career as a law clerk with Carr Korein
 12 Tillery in 2000 as I attended St. Louis University School of Law. I joined the firm as an attorney
 13 upon graduation in 2001, and was elevated to partner on January 1, 2010.

14 5. I have considerable experience in the prosecution of complex litigation.
 15 Immediately following my admission to practice, I was heavily involved in the briefing and
 16 presentation of the firm’s successful class certification motions in *Turner v. R.J. Reynolds*
 17 *Tobacco Co.*, 00-L-113 (Ill. Cir. Nov. 14, 2001), and *Howard v. Brown & Williamson Tobacco*
 18 *Co.*, 2001 WL 1910779 (Ill. Cir. Dec. 18, 2001). Since that time, I have had significant
 19 involvement in the briefing and presentation of motions for class certification in numerous
 20 matters including: *Johnson v. Allstate Ins. Co.*, 07-781 (S.D. Ill. Jan. 7, 2010); *Parker v. Sears,*
 21 *Roebuck & Co.*, 04-L-716 (Ill. Cir. Feb. 7, 2007); *Barbara’s Sales Inc. v. Intel Corp.*, 2004 WL
 22 5723558 (Ill. Cir. July 12, 2004), and *Prather v. Pfizer Inc.*, 02-L-480 (Ill. Cir. Mar. 2, 2004). I
 23 have also handled matters before the Judicial Panel for Multidistrict Litigation including
 24 successfully arguing for transfer in *In re: Google Inc. St. View Elec. Commc’ns Litig.*, 733 F.
 25 Supp. 2d 1381 (J.P.M.L. 2010) (on brief), and successfully defeating a motion to transfer in *In re:*
 26 *Facebook Use of Name & Likeness Litig.*, MDL No. 2288, 2011 WL 4684354 (J.P.M.L. Oct. 6,
 27 2011) (argued).

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1 6. I routinely bear the responsibility for the briefing and argument of dispositive and
 2 jurisdictional motions; as in cases such as: *Johnson v. Allstate Ins. Co.*, 2009 WL 3230157 (S.D.
 3 Ill. Sept. 30, 2009); *Travis v. Allstate Ins. Co.*, 06-L-332 (Ill. Cir. May 28, 2008); *Carr v.*
 4 *Gateway Inc.*, 03-L-1271 (Ill. Cir. Dec. 12, 2007); *Lott v. Pfizer Inc.*, 2006 WL 2224155 (S.D. Ill.
 5 Aug. 2, 2005); *Martin v. Bayer Corp.*, 04-L-768 (Ill. Cir. May 23, 2006); *Graham v. Shell Oil*
 6 *Co.*, 2006 WL 1004725 (S.D.N.Y. Apr. 17, 2006); *SimmonsCooper LLC v. Arthur J. Gallagher &*
 7 *Co.*, 04-L-1194 (Ill. Cir. Aug. 18, 2005); *Hoormann v. SmithKline Beecham Corp.*, 04-L-715 (Ill.
 8 Cir. Mar. 31, 2005); *SimmonsCooper LLC, v. Arthur J. Gallagher & Co.*, 04-928-GPM (S.D. Ill.
 9 March 8, 2005); *Sumner v. Merck & Co., Inc.*, 04-864 (S.D. Ill. 2005); *Lott v. Pfizer Inc.*, 2005
 10 WL 3618027 (S.D. Ill. May 26, 2005); and *Barbara's Sales Inc. v. Intel Corp.*, 02-L-788 (Ill. Cir.
 11 Sept. 3, 2003).

12 7. I also have extensive appellate experience having been responsible for briefing and
 13 arguing such appeals as: *Holiday Shores Sanitary Dist. v. Syngenta Crop Prot., Inc.*, No. 111881
 14 (Ill. Sept. 28, 2011); *Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. Feb. 3, 2011) (argued); *Holiday*
 15 *Shores Sanitary Dist. v. Syngenta Crop Prot., Inc.*, 05-10-0549 (Ill. App. Jan 13, 2011); *Carr v.*
 16 *Gateway Inc.*, 918 N.E.2d 598 (Ill. App. 2009) (argued); *Lott v. Pfizer Inc.*, 5-08-235 (Ill. App.
 17 Oct. 21, 2008); *Travis v. Allstate Ins. Co.*, 5-08-110 (Ill. App. Apr. 10, 2008); *Baldwin v.*
 18 *Mendelsohn*, No. 104487 (Ill. 2007); *Hoormann v. Smithkline Beecham Corp.*, No. 5-07-0033 (Ill.
 19 App. 2007); *Cooper v. The IBM Pers. Pension Plan*, 240 F. App'x 133 (7th Cir. 2007); *Lott v.*
 20 *Pfizer Inc.*, 492 F.3d 789 (7th Cir. 2007) (argued); *Hoormann v. Smithkline Beecham Corp.*, No.
 21 5-06-0624 (Ill. App. 2006); *Barbara's Sales, Inc. v. Intel Corp.*, 857 N.E.2d 717 (Ill. App. 2006);
 22 *Hubbert v. Dell Corp.*, 835 N.E.2d 113 (Ill. App. Ct. 2005) (on brief); and *Pfizer Inc. v. Lott*, 417
 23 F.3d 725 (7th Cir. 2005).

24 8. In 2008, *The St. Louis Post-Dispatch* published a feature highlighting my practice.
 25 Susan Weich, Lawyer a Victor in Class Actions, Says He Fights For Little Guy, *St. Louis Post-*
 26 *Dispatch*, June 29, 2008 at D1, available at 2008 WLNR 11428739. My work has also been
 27 featured in: *The American Lawyer* (Aruna Viswanatha, King & Spalding Lawyer Stirs State
 28 Judge's Ire, 1 Am. Law., Jan. 2007, at 50, available at www.americanlawyer.com).

1 digital.com/americanlawyer/tal200701?pg=50), and *the National Law Journal* (The Plaintiffs' 2 Hot List, 30 *Nat'l L.J.*, Nov. 22, 2007, at S7).

3 9. Particularly relevant to this case, I also have considerable experience prosecuting 4 involving computer technology. I generally serve as the Korein Tillery attorney primarily 5 responsible for any technology related litigation and as such have argued such cases before the 6 Illinois Supreme Court. *See, e.g., Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. Feb. 3, 2011).

7 10. I also have considerable experience in class action litigation concerning minors. 8 For example, I was the attorney primarily responsible for the prosecution of *Hoormann v.* 9 *SmithKline Beecham*, 04-L-715 (Ill.Cir.Ct. May 17, 2007). In July 2004, Korein Tillery filed suit 10 on behalf of a nationwide class of purchasers alleging that SmithKline Beecham promoted Paxil® 11 and Paxil CR for prescription to children and adolescents despite having actual knowledge that 12 these drugs exposed children and adolescents to dangerous side effects while failing to treat their 13 symptoms. Following three years of litigation, Korein Tillery obtained a settlement that 14 established a \$63.8 million fund to reimburse class members 100% of their out-of-pocket 15 expenses. In contrast, the New York Attorney General's office settled their lawsuit concerning 16 the same conduct for a \$2.5 million fine.

17 11. Throughout the prosecution of the *C.M.D.* Action, I have been in contact with 18 numerous experts in the field of privacy and minor advocacy – including those associated with *cy 19 pres* recipients to the *Fraley* Settlement.

20 12. Throughout the course of the litigation in the *Fraley* matter, I provided substantial 21 legal support to counsel for the *Fraley* plaintiffs. Counsel for the *Fraley* plaintiffs and co-counsel 22 in the *C.M.D.* matter agreed to coordinate and have exchanged discovery. Likewise, I have 23 provided significant assistance to counsel for the *Fraley* plaintiffs by way of legal research and 24 analysis.

25 13. Throughout the course of the litigation in the *Fraley* matter, counsel for the *Fraley* 26 plaintiffs have reached out to me on numerous occasions for guidance in prosecuting the case, 27 which I have provided. (Exh. A and B). On other occasions, I have provided unsolicited advice 28 concerning litigation strategy. Of particular note, in the early stages of the *Fraley* matter I

1 attempted to explain the difficulties concerning implied consent that may arise should they
 2 continue to seek to apply Cal. Civ. § 3344 to a class but my concerns were rebuffed.

3 14. In the course of these discussion, Bob Arns represented to me that they would
 4 never attempt to settle the claims asserted in C.M.D.

5 15. Despite my active involvement in the *C.M.D.* and *Fraley* matters, I was unaware
 6 that Facebook and the *Fraley* plaintiffs were engaged in settlement negotiations until the evening
 7 of May 21, 2012 when I received a telephone call from Bob Arns.

8 16. In that phone call Mr. Arns advised me that his firm had reached a non-monetary
 9 settlement with Facebook that would not release the claims asserted in *C.M.D.* but that Facebook
 10 wanted to include us in the settlement and by doing so the *C.M.D.* counsel would be able to
 11 recover their lodestar in the settlement. I conveyed to Mr. Arns my disappointment in a settlement
 12 of claims that did not provide for an opportunity for class members to receive monetary relief and
 13 that as a matter of principle, my firm would unlikely participate in his proposed settlement.

14 17. On May 23, 2012, I spoke with Counsel for Facebook Michael Rhodes concerning
 15 the proposed settlement. I conveyed to Mr. Rhodes my disappointment in a settlement of claims
 16 that did not provide for an opportunity for class members to receive monetary relief and that as a
 17 matter of principle, my firm would unlikely participate in his proposed settlement and pleaded for
 18 Mr. Rhodes to allow me and my co-counsel the opportunity to suggest various ways in which
 19 such a settlement could be accomplished.

20 18. On June 5, 2012, my partner Steve Katz and I met with Mr. Rhodes in his San
 21 Francisco office to discuss the proposed settlement. In that meeting, we again suggested that the
 22 settlement should provide for an opportunity for class members to receive monetary relief or
 23 alternatively should not release damage claims. At no point in these discussions did Mr. Katz or
 24 myself, or any other associated counsel discuss or otherwise demand any payment of attorneys'
 25 fees in connection with the proposed settlement.

26 19. After learning of the proposed settlement, I tried—on numerous occasions—to
 27 obtain a complete settlement term sheet and the material provisions of the proposed *Fraley*
 28 settlement. Despite my best efforts, we were denied until June 5, 2012 when we were provided a

term sheet that provided basic and vague information regarding the settlement, which was purportedly protected under a claim of “trade secret.” (Exh. C)

20. As such, we remained unaware of the final terms of the *Fraley* settlement until after the motion for preliminary approval of the settlement was filed. On June 19, 2012, I informed counsel in the *Fraley* action that, because the papers were filed under seal, we could not “review the scope of the release or the consolidation offered for that release or any of the numerous other features of the settlement necessary to evaluate its fairness. There isn’t even a redacted version available for review.” (Exh. D)

21. We finally received redacted versions of the *Fraley* plaintiffs' brief in support of settlement on June 20, 2012. It was at this point that Counsel for *C.M.D.* were first able to evaluate a proposed release that extended beyond claims related to sponsored stories.

22. As soon as counsel for the *C.M.D.* plaintiffs determined that the *Fraley* plaintiffs no longer represented the best interests of the *C.M.D.* Plaintiffs, we moved to intervene in this action.

23. Although I have discussed the potential settlement with various interest groups, including those who intend to object, neither I, nor any member of my firm has encouraged a potential *cy pres* recipient to object to this settlement.

Affirmed this 10th day of July 2012.

Aaron M. Zigler

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